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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DEYJWONN HIGHTOWER, Defendant and Appellant.	C071682 (Super. Ct. No. 09F03130)

Following our original opinion in this case, the California Supreme Court transferred the matter to us with directions to vacate our decision and to reconsider the cause in light of *People v. Fuentes* (2016) 1 Cal.5th 218 (*Fuentes*). We have reviewed the supplemental letter briefs from the parties.

A jury convicted defendant Deyjwonn Hightower of shooting at an inhabited dwelling house, and found that he committed the crime for the benefit of a criminal street

gang. Applying Penal Code section 186.22, subdivision (b)(4),[1] the trial court sentenced defendant to 15 years to life in prison.

Defendant contends on appeal that the trial court erred in (1) admitting evidence of a hand gesture defendant made 30 minutes before the crime, and (2) determining it had no discretion to impose a lesser sentence.

We will affirm the conviction, concluding there was no evidentiary error. However, we will vacate the sentence and remand the matter. In *Fuentes*, the California Supreme Court determined a trial court has discretion under section 1385, subdivision (a) to strike a section 186.22 gang enhancement. (*Fuentes, supra*, 1 Cal.5th at pp. 221-222.) Because the trial court concluded it lacked such discretion, we will remand for resentencing.

BACKGROUND

Velda Renfro saw defendant driving past her home with two or three other boys in April 2009. She recognized him because he lived in her neighborhood and hung around with her son. She testified that as he drove by, he made a hand gesture toward her as if he were shooting a gun. She perceived the gesture as intimidating.

About thirty minutes later, Renfro noticed police in the neighborhood. A confrontation between defendant's gang and a rival gang had ended in gunfire. A fellow gang member testified for the prosecution, saying that he had brought a loaded gun to the confrontation. At the last minute, however, he gave the gun to defendant, who was 15 years old, because defendant wanted to "get active" with the gang by shooting at rivals. But police found the gun still loaded and the witness was positively identified as one of the shooters. Additional details regarding the crime are included in the discussion *post*.

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[1] Undesignated statutory references are to the Penal Code.

The jury convicted defendant of shooting at an inhabited dwelling house (§ 246 -- count one). The jury also found that defendant committed the offense for the benefit of, at the direction of, or in association with, a criminal street gang (§ 186.22, subd. (b)(1)). The jury found defendant not guilty on three counts of assault with a firearm (§ 245, subd. (a)(2) -- counts two, three and four).

At sentencing, the trial court noted defendant's youth and bad judgment and described the sentencing law as overly rigid and harsh under the circumstances. Nonetheless, based on appellate court decisions, the trial court concluded it was without discretion to impose a lesser sentence. Applying section 186.22, subdivision (b)(4), the trial court sentenced defendant to 15 years to life in prison.

DISCUSSION

I

Defendant contends the trial court erred in admitting evidence of the hand gesture he made to Renfro as if he were shooting a gun. Defendant argues the testimony was not relevant under Evidence Code section 350 and was unduly prejudicial under Evidence Code section 352.

Before trial, defendant successfully moved to exclude testimony by Renfro regarding a longstanding dispute between her son and defendant. But the trial court denied defendant's motion to exclude Renfro's testimony regarding the hand gesture, finding the testimony highly probative.

Only relevant evidence is admissible. (Evid. Code, § 350.) Courts have discretion to exclude relevant evidence if its probative value is substantially outweighed by the probability of undue prejudice. (Evid. Code, § 352.) Defendant concedes that his presence near the scene of the crime with two or three other males was relevant, but because he lived in the neighborhood he characterizes that part of Renfro's testimony as not "highly incriminating." His concern is with the testimony about the hand gesture, which he asserts was criminal propensity evidence offered only to prove he would be

likely to shoot at an inhabited dwelling house. He adds that the evidence was inherently inflammatory and likely to evoke an emotional response from the jury.

Evidence that serves no purpose but to demonstrate criminal propensity is not admissible. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 392.) Such evidence may be admissible, however, to prove a relevant fact such as opportunity, intent or identity. (Evid. Code, § 1101, subd. (b).) The Attorney General argues that making a shooting gesture while riding in a car used a short time later in a gang shooting is highly probative of opportunity, identity and state of mind.

Police found the car abandoned at the scene. Renfro's testimony placed defendant in the car and in the crime area just before the crime. A police officer testified that defendant became a suspect because of his connection to the car. Renfro's testimony was probative of identity and opportunity, and the testimony about the gesture and its context was probative of defendant's state of mind.

Relevant evidence is unduly prejudicial only when its emotional impact creates a substantial likelihood the jury will not use it to logically evaluate a point but rather as an excuse to reward or punish. (*People v. Scott* (2011) 52 Cal.4th 452, 491.) We will not disturb a trial court's Evidence Code section 352 determination absent proof that it exercised its discretion in an " 'arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) Renfro's description of the hand gesture was succinct and, although she reported perceiving it as intimidating, there is no showing that the trial court's exercise of discretion was arbitrary, capricious or patently absurd. The trial court did not abuse its discretion in admitting evidence of the hand gesture.

II

Defendant also contends the trial court erred in determining that it had no discretion to impose a lesser sentence.

At sentencing, the trial court stated that imposing a 15-year-to-life sentence in this case appeared to be mandatory under section 186.22, subdivision (b)(4), but added, "I am troubled by a law which requires the incarceration of someone as young as you are for as long as it does require." Defendant argues the sentence was not mandatory; he claims the trial court had authority to dismiss the gang allegations and to impose a lesser sentence.

Section 186.22, subdivision (b) provides in relevant part:

"(1) Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows:

[¶] . . . [¶]

"(4) Any person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

"(A) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under [section 1170 et seq.], or any period prescribed by Section 3046 [concerning life sentences], if the felony is any of the offenses enumerated in subparagraph (B) or (C) of this paragraph.

"(B) Imprisonment in the state prison for 15 years, if the felony is a . . . violation of Section 246 [shooting at inhabited dwelling house, etc.] . . . .

"(C) Imprisonment in the state prison for seven years, if the felony is extortion . . . or threats to victims and witnesses . . . .

"(5) Except as provided in paragraph (4), any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served."
(§ 186.22, subd. (b).)

In addition, section 186.22, subdivision (g) provides:

"Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition."
(§ 186.22, subd. (g).)

The issue decided in *Fuentes* was whether a trial court has discretion under section 1385, subdivision (a) to dismiss a section 186.22, subdivision (b)(1) sentencing enhancement allegation or if the court is limited to its authority under section 186.22, subdivision (g) to strike the additional punishment for the section 186.22, subdivision (b) enhancement. (*Fuentes, supra*, 1 Cal.5th at pp. 221-222.) As the Supreme Court explained, "Under section 186.22[, subdivision](g), a trial court's discretion is limited to striking any additional punishment for an enhancement provided in section 186.22[, subdivision](b)(1), and to refusing to impose a minimum jail sentence for section 186.22[, subdivision](d), in 'the interests of justice.' It does not authorize striking the enhancement itself." (*Fuentes*, at p. 224.) In contrast, section 1385, subdivision (a) gives a trial court discretion to dismiss the enhancement. (*Fuentes*, at p. 224.) The Supreme Court said there must be clear legislative direction eliminating a trial court's section 1385 authority, but the Legislature did not provide such clear direction when it enacted the predecessor of section 186.22, subdivision (g). (*Fuentes*, at pp. 226, 231.) Therefore, trial courts have discretion under section 1385, subdivision (a) to strike a section 186.22, subdivision (b) enhancement in the interests of justice.

The holding in *Fuentes* compels us to vacate the sentence in this case to give the trial court the opportunity on resentencing to exercise its discretion.

DISPOSITION

The conviction is affirmed, but the sentence is vacated. The matter is remanded to the trial court for resentencing consistent with *People v. Fuentes* (2016) 1 Cal.5th 218.

/S/
MAURO, J.

We concur:

/S/
ROBIE, Acting P. J.

/S/
BUTZ, J.